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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 1190

BERRYMAN HENWOOD, TRUSTEE, St. Louis Southwestern Railway Company,

Petitioner,

versus

AMOS WALLACE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

And

BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Berryman Henwood, Trustee for St. Louis Southwestern Railway Company, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This action was brought to recover damages sustained in a railroad crossing accident alleged to have been caused by the negligence of petitioner in operating a train.

Respondent was the owner and driver of the automobile which sought to cross the main line railroad track in front of petitioner's approaching train.

The case originated in the District Court of the United States for the Western District of Louisiana, jurisdiction being based on diversity of citizenship.

The accident occurred in Louisiana whose law controls. By the statutes and by the established jurisprudence of Louisiana, there is imposed upon the driver of an automobile, a legal duty, at his peril, to stop, look and listen before entering upon a crossing over a railroad track and contributory negligence of a motorist operates as a complete bar to any recovery on his part. Aside from denying in his answer the acts of negligence charged, in the alternative petitioner pleaded the contributory negligence of respondent (R. 8 and 12).

The case was submitted to the jury in the District Court upon the issues of the negligence of petitioner and contributory negligence of respondent, and from a judgment entered in that court on the jury's verdict for respondent, petitioner appealed.

The errors relied on by petitioner in the United States Circuit Court of Appeals related to the District Court's failure to grant petitioner's motion for a directed verdict and his motion for judgment notwithstanding the verdict of the jury and in the alternative for a new trial (R. 161-162).

The judgment appealed from was affirmed by the court below with Judge Sibley, the senior judge, dissenting and filing a written opinion.

The majority opinion, rendered through Judge Holmes, stated:

> "The question before this court, on appeal, is not what we would have done if we had been members of the jury, or what a Louisiana trial court, sitting without a jury, would or should have done, or even what the Supreme Court of Louisiana would do in reviewing the case upon both the law and the facts. The question before us is whether, after an examination of the entire record, we are able to say that the substantial rights of the defendant were prejudicially affected by the submission to the jury of the issue as to contributory negligence."
>
> (R. 176).

And the Court held for respondent.

On the other hand, Judge Sibley in his dissenting opinion concluded as to respondent and the failure of the trial judge to direct a verdict for petitioner:

> "* * * He was negligent by the statutory law of Louisiana and by the standard of the conduct of a prudent man at a railroad crossing known to him to be dangerous. The judge, trying a law case in a constitutional jury trial in a federal court was

bound to tell the jury on request that this man cannot recover. A judgment of affirmance disregards the law of Louisiana * * *." (R. 186).

Petition for rehearing was timely filed, but was refused with Judge Sibley again dissenting.

JURISDICTION.

The original judgment of the Circuit Court of Appeals was entered February 4, 1947 (R. 187); the opinion refusing the rehearing on March 4, 1947 (R. 193).

Jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U.S.C., Sec. 347).

QUESTIONS PRESENTED.

The questions presented are:

1. Whether under the circumstances of the case the question of respondent's contributory negligence became a matter of law to be determined by the trial court.

2. Whether the Circuit Court of Appeals erred in sustaining the District Court in refusing to grant petitioner's motion for a directed verdict at the conclusion of all the evidence.

3. Whether the Circuit Court of Appeals erred in later sustaining the District Court in overruling petitioner's motion for judgment notwithstanding the verdict of the jury and in the alternative for a new trial.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner with respect gives as reasons for the issuance of a writ of certiorari the following matters:

1. The majority opinion below has determined an important question of local law contrary to the local statutory law and decisions.

2. The decision in this case is contrary to the decision in *Erie R. R. Co. v. Tompkins, 304 U. S. 64.*

3. This matter is important from an administrative standpoint because, if the decision below is allowed to stand, the federal courts in Louisiana will become overburdened with railroad crossing accident cases where diversity of citizenship exists.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case No. 11,649, entitled on its docket "Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Petitioner, versus Amos Wallace, Respondent," and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just and for such other relief as the Court may deem proper.

C. HUFFMAN LEWIS,
W. SCOTT WILKINSON,
EDWARD S. KLEIN,
Attorneys for Petitioner.

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The decision of the Circuit Court of Appeals has not as yet been reported. The prevailing opinion is on pages 174 to 182 of the Record; the dissenting opinion is on pages 182 to 186 of the Record.

STATEMENT OF THE CASE.

In addition to the matters related in the summary in the petition for certiorari herein, the actual facts in the case are tersely set forth in the dissenting opinion of Judge Sibley (R. 184-186).

The majority decision below with respect seeks to support its holding in contravention of the pertinent statutory law and jurisprudence of Louisiana by concluding that respondent moved slowly toward petitioner's railroad track, "looking and listening." (R. 181). This, however, does not suffice.

As Judge Sibley stated in regard to respondent:

> "He had at least 20 feet of clear space in which, familiar with the place, he might have stopped in safety, and looked at his leisure. He might by looking carefully and at once have saved himself without first stopping. His testimony is, and the

truth is too plain for dispute, that he did not stop or look till within four feet of the track when it was too late to do any good by doing either."

(R. 186).

And apart from the "stop, look and listen" rule, as embodied in the statutory law of Louisiana, it has become settled by repeated Louisiana decisions that a motorist approaching a railroad track is under a duty to stop, look and listen where the exercise of such precautions will be effective; that such motorist is held to have seen what could have been seen and to have heard what could have been heard; and that obstructions of the view impose upon the motorist an obligation to be even more cautious.

THE LOUISIANA STATUTORY LAW.

The latest statutory expression on the obligation of a motorist to stop, look and listen at a railroad crossing is Paragraph (a) of Rule 17 of Section 3 of Title II of Act 286 of 1938 (the Highway Regulatory Act), Dart's La. Gen. Stats. Sec. 5222, which is set out in the dissenting opinion (R. 183).

There also is an earlier statute, Act 12 of the Louisiana Legislature of 1924, Dart's La. Gen. Stats. Secs. 8136 and 8138.

The pertinent provisions of the above laws are contained in the appendix to this memorandum brief.

THE LOUISIANA DECISIONS.

(The federal cases cited infra relate solely to Louisiana matters with Louisiana cases and authorities cited therein).

1.

A motorist when approaching a railroad crossing must stop, look and listen for trains at a time and place where such stopping, looking and listening will be effective.

Young v. Louisiana Western R. Co., 153 La. 129, 132, 133, 95 So. 511, 512.

Gibbens v. New Orleans Terminal Co., 159 La. 347, 350-3, 105 So. 367, 368-9.

Noel v. New Iberia & N. R. Co. (La. App.), 145 So. 377.

2.

A motorist cannot be excused from seeing a train because he looked and did not see it or from hearing a train because he listened and did not hear it. In this matter, the train was there; respondent should have seen it and he should have heard it. Under the Louisiana law he is held to have seen it and to have heard it.

Pylant v. C. R. I. & P. Ry. Co., 8 La. App. 350.

Lewis v. Thompson (W. D. La.), 47 F. Supp. 435, 441.

3.

The greater the difficulty of seeing or hearing a train as a motorist approaches a railroad crossing, the greater the caution the law imposes upon him.

Illinois Central Railroad Co. v. Leichner (C. C. A. 5), 19 F. (2d) 118, 120.

Lewis v. Thompson (W. D. La.), 47 F. Supp. 435, 440.

Adams v. New Orleans, T. & M. Ry. Co., 9 La. App. 238, 239, 119 So. 266, 267.

4.

Granting the failure of a train to give proper signals of its approach or the excessive speed of a train and the negligence of the driver of an automobile in recklessly going upon the track without stopping, looking or listening bars any recovery on his part.

Lockhart v. Missouri Pacific R. Co. (La. App.), 153 So. 577, 581.

Williams v. Thompson (W. D. La.), 48 F. Supp. 760, 764.

5.

CONTRIBUTORY NEGLIGENCE.

The following from the decision in *Slayter v. Texas and P. R. Co.* (La. App.), 182 So. 343, 345, 346, is applicable in every respect to this action:

"Plaintiff was guilty of gross negligence in attempting to cross the tracks without observing the most elemental rule, recognized and enforced by all

the courts of the country, viz., that which imposed upon him the imperative duty to stop, look and listen for trains. Had he done this, there would have been no accident. He was intimately acquainted with the nature and hazards, if any, of the crossing. He knew that trains on the main and switch tracks passed back and forth regularly and frequently. And, of course, he knew that if, in attempting to pass over the tracks, he was struck by a train, death or great bodily harm would almost inevitably result. In view of all this he chose to gamble with fate, and lost. Surely his own gross negligence and lack of exercise of any care and precaution at all, in the respects mentioned, stand as an insurmountable barrier to his efforts to compel the defendant to compensate him for damages so easily traceable to his own dereliction; and this too, even though defendant be found not free of the negligence, in whole or in part, charged to it as the proximate cause of the collision."

Callery v. Morgan's L. and T. R. Co., 139 La. 763, 72 So. 222.

Illinois Central Railroad Co. v. Leichner (C. C. A. 5), 19 F. (2d) 118, 120.

Louisiana & Arkansas Ry. Co. v. Jackson (C. C. A. 5), 95 F. (2d) 369, 372.

Williams v. Thompson (W. D. La.), 48 F. Supp. 760, 763.

CONCLUSION.

There was imposed upon respondent by the statutes and by the jurisprudence of Louisiana a legal duty, at his peril, to stop, look and listen before entering upon the railroad crossing. *Lewis v. Thompson* (W. D. La.), 47 F. Supp. 435, 440. This duty in each particular of stopping, looking and listening was violated by respondent, who entirely familiar with the crossing, the entire physical situation and all its surroundings, drove his automobile out in front of defendant's oncoming train and met the inevitable fate which such action forecast.

The decision in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 assured the same outcome of litigation in the federal courts as in state courts in diversity of citizenship cases. *Guaranty Trust Company v. York*, 326 U. S. 99, 109. This result is not achieved if the majority opinion below is allowed to stand.

WHEREFORE, petitioner respectfully prays that certiorari be granted.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of the Louisiana Highway Regulatory Act (Act No. 286 of 1938) and Act No. 12 of 1924.

"Rule 12. (Explosives, Inflammables, Railroad Grade Crossings).

"(a) It shall be the duty and obligation of every person owning, driving, operating, or causing or permitting a vehicle to be so driven or operated, when approaching at grade crossing of a public street, road or highway with any steam, electric, street, interurban or other railroad or tramway, operated upon fixed rails or permanent track, to, upon his own responsibility, bring such vehicle to a full and complete stop at such a place, in such a manner and for a sufficient period of time to enable the driver or operator thereof to observe the approach of trains or cars thereon, by looking up and down said track in both directions and by listening therefor, and before proceeding thereon or thereover. In the event it is impossible so to do, then such persons shall proceed only with the greatest caution and at their peril."

(Acts 1938, No. 286, Sec. 3, Title II, Rule 17, Par. (a), Dart's La. Gen. Stats. Sec. 5222).

* * * * * *

"Section 16. All laws or parts of laws in conflict or inconsistent herewith be, and the same are, hereby repealed, especially Act 21 of 1932."

(Acts 1938, No. 286, Sec. 16, Title VIII, Dart's La. Gen. Stats. Sec. 5289).

* * * * * *

"Locomotive Whistle and Bell.

"Section 1. Be it enacted by the Legislature of Louisiana, That every railroad company shall cause each locomotive engine run by it to be provided with a bell of at least thirty pounds weight and a steam whistle which can be heard distinctly at a distance of three hundred yards, and shall cause the bell to be rung or the whistle to be blown at the distance of at least three hundred yards from the place where the railroad crosses over any highway or municipal street, and the bell shall be kept ringing or the whistle shall be kept blowing continuously until said crossing is passed."

(Acts 1924, No. 12, Sec. 1, Dart's La. Gen. Stats. Sec. 8136).

* * * * * *

"Stop, Look and Listen.

"Section 3. That it shall be unlawful for any person to drive or propel any automobile or automobile truck or other motor driven vehicle upon any railroad track at a public highway or municipal street intersecting such railroad at grade crossing without first stopping at a distance of not

less than ten feet nor more than fifty feet from the nearest track and looking for train; * * * In the trial of all actions to recover personal injury or property damages sustained by any driver of such motor driven vehicles by collision of said vehicle and train in which action it may appear that the said driver may have violated any of the provisions of this act, the question of whether or not the said violation was the sole or proximate cause of the accident and injury shall be for the jury to determine regardless of the penalizing feature of this act. That the violation of this act shall not affect recovery for damages and the question of negligence or the violation of this act shall be left to the jury; and the contributory negligence statutes of Louisiana shall apply in these cases as in other cases of negligence."

(Acts 1924, No. 12, Sec. 3, Dart's La. Gen. Stats. Sec. 8138).